

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOMBARDIER INC.,
Plaintiff,

v.

MITSUBISHI AIRCRAFT CORPORATION,
MITSUBISHI AIRCRAFT CORPORATION
AMERICA INC., AEROSPACE TESTING
ENGINEERING & CERTIFICATION INC.,
MICHEL KORWIN-SZYMANOWSKI,
LAURUS BASSON, MARC-ANTOINE
DELARCHE, CINDY DORNÉVAL, KEITH
AYRE, AND JOHN AND/OR JANE DOES 1-
88,

Defendants.

No. 2:18-cv-01543-JLR

BOMBARDIER INC.'S
RESPONSE TO DEFENDANT
MITSUBISHI AIRCRAFT
CORPORATION'S SUR-REPLY
IN OPPOSITION TO PLAINTIFF'S
UPDATED MOTION FOR
PRELIMINARY INJUNCTION

Plaintiff Bombardier Inc. (“Bombardier”) thanks the Court for the opportunity to respond to Defendant Mitsubishi Aircraft Corporation’s (“MITAC’s”) sur-reply (Dkt. # 210). MITAC accuses Bombardier of making a false statement based on purportedly “clear statement[s]” from MITAC’s digital forensic examiner that required a “supplementary” declaration for clarity. As explained below, Bombardier’s representations were—and continue to be—based on the very testimony MITAC submitted (and, as it turns out, failed to submit). And that Bombardier has not withdrawn its purportedly false statement is because MITAC’s latest filing problematically cannot be reconciled with previous testimony. A full understanding of relevant events can be best assessed by reviewing three relevant time periods: (1) the time leading up to and including the filing of Bombardier’s Reply in Support of Bombardier’s Updated Motion for Preliminary Injunction; (2) the time period immediately thereafter, during which the parties met and conferred; and (3) the time period beginning from when MITAC filed its sur-reply and third Declaration of Duc Nguyen (hereinafter, “Nguyen Decl. 1, 2, or 3”).

1. Filing of Bombardier Reply

The purportedly false statement that Bombardier made (that Defendant “Dornéval affirmatively uploaded [Bombardier’s CAFM Methodology] to her personal MITAC laptops”) was reasonably based on the testimony provided. As an initial matter, Mr. Nguyen’s declarations stated that the facts contained therein were predicated on “personal and firsthand knowledge.” Nguyen Decl. 1, 2. Mr. Nguyen’s two declarations had never indicated that he had reviewed any non-MITAC-A laptops. Mr. Nguyen’s first declaration disclosed a number of MITAC-A laptops as having been reviewed, two of which were assigned to Ms. Dornéval personally. Dkt. # 79, ¶ 7. Exhibits C1 and C2 to the declaration are custody logs for several computing devices that were provided to Mr. Nguyen for forensic analysis. *Id.* Those custody logs identify the two MITAC-A laptops assigned to Ms. Dornéval and also identify at least two devices (a USB thumb drive and an external hard drive) that in contrast are explicitly identified as being personally owned by Ms. Dornéval. The custody logs do not identify, explicitly or otherwise, any laptop personally owned by Ms. Dornéval. *Id.* Likewise, Mr. Nguyen’s second

1 declaration (Dkt. # 178) specifically identified the same two MITAC-A laptops which had been
2 assigned to Ms. Dornéval. *Id.* ¶ 5. Again, none of the devices identified by Mr. Nguyen was a
3 computer owned by Ms. Dornéval. Because his declaration was based on “personal and
4 firsthand knowledge,” it was reasonable for Bombardier to conclude that Mr. Nguyen used the
5 phrase “personal computer” to refer to one of the MITAC-A laptops explicitly identified in his
6 report as assigned to Ms. Dornéval personally. To conclude otherwise would assume that Mr.
7 Nguyen had misleadingly withheld from his declarations highly relevant information about the
8 devices he had reviewed.

9 Further, any other interpretation could not be reconciled with Mr. Nguyen’s plain
10 statements. In his second declaration, Mr. Nguyen testified that he “performed an MD5 hash
11 value analysis,” and in the very next sentence testified based on personal knowledge that “[o]ne
12 of the Burns & Tidd documents was present on Ms. Dorneval’s personal computer.” Nguyen
13 Decl. 2, ¶ 7. A reasonable reading of those two consecutive sentences is that Mr. Nguyen
14 located the document identified in his second sentence based on the “MD5 hash value analysis”
15 identified in his first sentence. And because he had never disclosed that he had searched a
16 computer owned by Dornéval personally, Bombardier had no reason to suspect otherwise.

17 **2. The Parties Meet and Confer**

18 MITAC objected to Bombardier’s reply brief stating that Bombardier had
19 misrepresented the testimony of Mr. Nguyen. MITAC contended that Bombardier disregarded
20 Mr. Nguyen’s statement that “[t]his file name search analysis, combined with the analysis
21 explained in my December 26, 2018 Declaration, has not identified a copy of any of the eleven
22 Burns and Tidd documents on any of the devices or servers I was provided or provided access
23 to.” Sur-reply, Dkt. # 210, at 2. However, MITAC overstates the significance of that statement.
24 Mr. Nguyen did not testify, as MITAC contends, that he did not find any of the 11 documents on
25 any MITAC-A devices. *Id.* Rather, he testified that *a subset of the analyses he employed* did not
26 locate any of the 11 documents. *See* Nguyen Decl. 2 (Dkt. #178), ¶¶ 3, 4 (identifying six
27 different analyses that he employed, but testifying only about the “file name search analysis”

1 and his previous efforts). This is the only reading of Mr. Nguyen's testimony that reconciles his
 2 otherwise inconsistent statement that, based on his personal knowledge, one of the documents
 3 was in fact located. (*Compare id.* ¶ 4 (specific subset of analyses employed did not locate any
 4 documents), *with id.* ¶ 7 (one of the documents was located).) Perversely, it is Bombardier's
 5 understanding of his testimony—not MITAC's—that uniquely preserves Mr. Nguyen's
 6 credibility: unless Mr. Nguyen found the document on a MITAC-A laptop by way of one of the
 7 other six search analyses he identified (Bombardier's understanding and the basis for its
 8 purportedly false statement), Mr. Nguyen either (a) failed to fully disclose relevant information;
 9 (b) testified as to matters outside of his personal knowledge; or (c) both.

10 MITAC could not reasonably expect Bombardier to retract a statement as false where the
 11 only basis for its purported falsity hinges on an interpretation of testimony that impugns the
 12 declarant's credibility. And Bombardier certainly could not be expected to do so without first
 13 seeing a corrected declaration (which Bombardier did not receive until after the Court received
 14 its copy). This is particularly the case where MITAC's counsel disclosed for the first time
 15 during the meet and confer on this issue that Mr. Nguyen's declarations *in fact did not fully*
 16 *disclose all the devices that were provided to him.*

17 **3. Post-Filing of Mr. Nguyen's Third Declaration**

18 Upon finally having the opportunity to review Mr. Nguyen's clarifying declaration (Dkt.
 19 # 212), Bombardier still could not reasonably be expected to withdraw its purportedly false
 20 statement. While Mr. Nguyen declares explicitly that the CAFM Methodology was resident on
 21 Ms. Dornéval's personally owned laptop, he does nothing to reconcile the now-confirmed
 22 inconsistent statements in his second declaration. Further, Mr. Nguyen's third declaration
 23 highlights the now apparent incomplete disclosures made in his previous two declarations, it
 24 calls into question the thoroughness of searches conducted to date, and it casts doubt on the
 25 veracity of Mr. Nguyen's existing testimony not based on personal knowledge.

26 Bombardier did not submit a false statement or mislead the Court in any way. It stands by
 27 its conduct and is available to address any remaining concerns the Court may have.

1 Dated this 3rd day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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